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In The Supreme Court of the United States

DAVID SHOPE, HANK KLUMPP, CHARLES SHOOP, ROBERT BEST, RUTH BEST, ANDREW DRYSDALE, LOIS DRYSDALE, JERRY W. KERN and SANDRA KERN,
Petitioners,

v.

THE STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL AND THE NEW JERSEY WATER SUPPLY AUTHORITY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The New Jersey Highlands is the source of over one-third of the state's drinking water. N.J. Stat. Ann. §13:20-2. "Major development" in the Highlands is regulated by the New Jersey Highlands Water Protection and Planning Act, N.J. Stat. Ann. §13:20-1, et seq., also known as "the Highlands Act" and requires a permit from the New Jersey Department of Environmental Protection ("NJDEP") pursuant to N.J. Admin. Code §7:38-1, et seq., unless the development is exempt from permit requirements under N.J. Stat. Ann. §13:20-28, et seq. (55a).

Farmers who own property in the New Jersey Highlands petition this Court to decide whether the Highlands Act takes property for governmental use without just compensation in violation of the federal constitution. The Court should deny the Petition because the matter was not pled below, nor would it have been ripe for review had it been pled.

The Highlands Act expressly excludes farming from permit requirements. N.J. Stat. Ann. §13:20-3 (definition of Major Highlands Development.) Construction of agriculturally-related structures in the Preservation Area that increase impervious cover on a farm between three percent and nine percent of the farm area only require approval of a farm conservation

plan by the local soil conservation district (SCD). Id. at -29a(1). Development that increases impervious cover on a farm by nine percent or more, requires approval of a resource management system plan by both the SCD and NJDEP. Id. at -29a(2). The Highlands Act also exempts farmers from the 50,000 gallon a day limit on diversion of Highlands Waters that apply to other Highlands water users. Id. at -30.b(3), §58:1A-5.1. Water diversions over 100,000 gallons per day are regulated by the Water Supply Management Act, N.J. Stat. Ann. §58:1A-1, et seq., and its implementing regulations, N.J. Admin. Code §7:20A, pursuant to N.J. Stat. Ann. §58:1A-15.1.

Petitioners never applied to NJDEP for a permit to develop their property or for a waiver of NJDEP permit rules authorized by N.J. Stat. Ann. §13:20-33b (67a) and N.J. Admin. Code §7:38-6.8 (69a). Furthermore, Petitioners' state court litigation never alleged a taking but instead sought to invalidate the Highlands Act entirely, and based the claim upon arguments having nothing to do with a regulatory taking.

In Count One of their complaint, Petitioners alleged that the Regional Master Plan enacted by the New Jersey Highlands Council under N.J. Stat. Ann. §13:20-8,-10 and -11, was enacted after the 18 month deadline in §8 and that the Act was, therefore, invalid. (40-41a). In Count Two, Petitioners alleged that the exemptions from the permitting requirements of the Highlands Act in N.J. Stat. Ann. §13:20-28 violated

their right to equal protection of the law because the exemptions were more valuable to small lot owners and disproportionately reduced the potential development value of larger properties. (40a-43a). In Count Three, Petitioners alleged that the State's failure to fund a Transferable Development Rights (TDR) program created in N.J. Stat. Ann. §13:20-13 rendered the Act invalid (40a,43a). In Count Four, Petitioners alleged that the Act was invalid due to a lack of scientific basis for the legislative delineation of the regulated area in §7. (40a,44a). The trial court granted the State's motion and dismissed the complaint in its entirety. The Appellate Division affirmed. County of Warren et als. v. State of New Jersey et als., 978 A.2d 312 (N.J. App. 2009)(9a). The New Jersey Supreme Court denied plaintiffs' petition for certification. (46a).

To the extent the Petition for certiorari is interpreted as raising a per se categorical takings claim on behalf of all farmers in the Highlands, the Petition should be denied because, as demonstrated above, the matter was not pled. Moreover, the claim is not facially sustainable because the Act not only exempts certain development from regulation, but also provides opportunities for development by way of a permit program which also allows NJDEP to waive those permit requirements to avoid a takings without just compensation, to protect public health and safety, or to allow redevelopment. N.J. Stat. Ann. §13:20-28,-32,-33.

The Court should also deny Petitioners' request to determine whether farming is a federal constitutional right. Petitioners introduced the claim by way of a motion to file a second amended complaint, as a supplement to petitioners' opposition the State's motion to dismiss. (Pb5). The trial court denied Petitioners' motion, and subsequently granted the State's motion to dismiss. During petitioners' motion for reconsideration of the order dismissing the Complaint, the trial court observed that Petitioners provided no proof that farming was either a protected right or a suspect classification. (34a).

Petitioners pursued their "right to farm" claim on appeal from the dismissal of their equal protection challenge to the Act's permit exemptions, arguing that the Highlands Act impinged upon the "right to farm" because the Act reduced the equity in larger properties by 75 percent as compared to smaller properties. (18a). Thus, Petitioners argued, the trial court erred in utilizing a rational-basis standard of review for their challenge to the Act's exemptions. The Appellate Division rejected the claim and concluded that the legislative decision to regulate more intense development on larger properties and to exempt from regulation more modest projects, such as one single family home on a lot, was rationally related to the legitimate governmental objectives in N.J. Stat. Ann. §13:20-2, which includes the goal of protecting the state's drinking water supplies and other natural resources from degradation by "piecemeal, scattered and inappropriate development" by adopting a regional

approach to land use development. (20a-21a, 24a).

Furthermore, the Appellate Division concluded, there was no constitutionally protected right to farm and thus, strict scrutiny of the Act's objectives and means was not indicated. (20a-21a, 24a). The appellate court further concluded that the Act did not preclude Petitioners from engaging in farming or deriving a beneficial use from their property. (18a-19a). The appellate court held that the Highlands Act only affects Petitioners' ability to develop their property in the most profitable manner, which is not a fundamental constitutional right. (19a). The Supreme Court declined Petitioners' request to review the decision.

Because the Highlands Act does not require a permit for farming, and Petitioners have not yet applied to NJDEP for a permit to develop their property or for a waiver of those permit requirements, the Court need not address Petitioners' constitutional claim and should dismiss the Petition.

ARGUMENT

I. CERTIORARI IS NOT WARRANTED ON PETITIONERS' CLAIM THAT THE HIGHLANDS ACT TAKES PROPERTY WITHOUT JUST COMPENSATION BECAUSE PERMITS AND PERMIT WAIVERS FOR DEVELOPMENT ARE AVAILABLE UNDER THE HIGHLANDS ACT AND PETITIONERS HAVE NOT APPLIED FOR THEM, RENDERING THEIR ALLEGATION OF A TAKING UNRIPE FOR REVIEW.

The Fifth Amendment to the United States Constitution prohibits the taking of private property "for public use without just compensation." U.S. Const. Amend. 5. Although the Petition asks this Court to determine whether the Highlands Act takes property without just compensation, Petitioners never raised the claim in their state court litigation and instead, challenged the validity of the Highlands Act on other grounds. Furthermore, a takings claim would not have been ripe for review if it had been pled, and the Petition should be rejected for this reason.

In Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed. 2d 126 (1985), the Court explained the requirement that a takings claim must be ripe. The Court held that a takings claim challenging the application of land-use regulations is

not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id. at 186. A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property pursuant to Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-1016, 112 S.Ct. 2886, 120 L.Ed. 2d 798 (1992), or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred under Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). These matters cannot be resolved in definitive terms until a court knows the extent of permitted development on the land in question. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351, 106 S.Ct. 2561, 91 L.Ed. 2d 285 (1986).

Because Petitioners have not applied for a Highlands permit or a permit waiver, there is no record of the uses permitted on Petitioners' property under the Highlands Act for this Court to review. The result is no different if the Petition is interpreted as a categorical taking claim on behalf of all Highlands farmers. A categorical or per se taking occurs when a regulation denies all economically beneficial or productive use of land. Lucas, supra, 505 U.S. at 1015-1016. However, in this case, a categorical takings claim is facially unsustainable. As the New Jersey Appellate Division observed (17a), agricultural

development does not need a permit under the Highlands Act pursuant to N.J. Stat. Ann. §13:20-3 which excludes farming from "major Highlands development" which requires a permit, and provides a means for farmers to build agriculturally-related structures on their property. Id. at -29a. Thus, the Highlands Act provides a beneficial use for Petitioners' property by allowing farming to continue. In addition, the Highlands Act also exempts certain non-agricultural development from regulation, Id. at -28, establishes a permit program which allows non-agricultural development that complies with permit requirements, Id. at -33a, and allows NJDEP to waive those permit requirements on a case-by-case basis to avoid a taking in the event the uses allowed by permit nevertheless deprive a property owner of their reasonable, investment-backed expectations. Id. at -33b(3).(19a).

For these reasons, the Court should deny the Petition insofar as it asks the Court to determine whether the Highlands Act takes property without just compensation.

II. THE COURT SHOULD DENY THE PETITION TO DECLARE FARMING A FUNDAMENTAL CONSTITUTIONAL RIGHT BECAUSE THE FACTS DO NOT REQUIRE ADJUDICATION OF THIS CONSTITUTIONAL QUESTION.

Farming is not a right under either the federal or New Jersey constitutions. Indeed, Petitioners admit that the only federal court to consider the matter has confirmed that farming is not a fundamental right. Pb15, citing United States v. Plume, 447 F.3d 1067, 1075 (8th Cir., 2006). At the state level, New Jersey's Right To Farm Act, N.J. Stat. Ann. §4:1C-1 to -10, only allocates jurisdiction over disputes between municipalities and commercial farms to the County Agricultural Board and the State Agricultural Development Committee, in order to ensure that farming activities are protected against unnecessary local interference. Twp. of Franklin v. Den Hollander, 769 A.2d. 467 (2001), aff'd, 796 A.2d 874 (N.J. 2002).

Despite a total absence of legal support, Petitioners allege that there is a constitutional right to farm and that New Jersey courts erred in applying the rational basis test to Petitioners' due process challenge to the exemption provisions of the Highlands Act, N.J. Stat. Ann. §13:20-28. The Appellate Division correctly rejected the claim, holding that there was no fundamental or constitutional "right" to farm and that Petitioners' equal protection claim was properly dismissed. (20a-21a, 24a).

The appellate court held that the legislative decision to regulate more intense development on larger properties under the Highlands Act and to exempt from regulation more modest projects, such as one single family home on a lot, was rationally related to the legitimate governmental objectives in N.J. Stat. Ann. §13:20-2, including the goal of protecting from degradation the state's drinking water supplies and the other natural resources. (20a-21a,24a). Plainly, larger, concentrated development projects on large land holdings have a greater capacity to adversely affect the environment as compared to one single family home and, thus, warrant regulation.

The Court will not pass upon a constitutional question if there is some other ground upon which the case may be disposed of. Slack v. McDaniel, 529 U.S. 473, 475, 120 S.Ct. 1595, 146 L.Ed. 2d 542 (2000). In this matter, the Court need not reach the constitutional question because the facts do not establish that the Highlands Act impedes the activity of farming. The Highlands Act neither requires a permit to farm property nor to construct agricultural buildings. N.J. Stat. Ann. §13:20-3, -29a. Instead, the permit requirements of the Highlands Act apply to non-agricultural development of property. Regulation of such development only implicates a constitutional right under the federal and state constitutions when it eliminates all or virtually all beneficial economic use of property and the property owner is deprived of just compensation for the loss of the property. As explained in Point I, Petitioners have not applied to NJDEP for

a permit to develop their property and thus, there is no ripe takings claim for adjudication.

For these reasons, the Court need not reach Petitioners' constitutional question and should dismiss the Petition.

CONCLUSION

For the foregoing reasons, the Petition for the writ of certiorari should be denied.

Respectfully submitted,

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